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Supreme Court of the United States

October Term No. 916

THOMAS KAPATOS,
Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,
Respondent-Appellee.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

THEODORE ROSENBERG,
Attorney for Petitioner-Appellant,
133 Schermerhorn Street
Brooklyn, New York 11201

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Memorandum Decision of Hon. Edward Weinfeld.
February 16, 1970

70 Civil 168

This is the third motion by petitioner to vacate his judgment of conviction entered upon a jury verdict. The constitutional claim now presented was the subject of direct appeal and also one of the grounds urged in support of his petition for certiorari, which was denied. 389 U.S. 836 (1967). The issue may not be relitigated by a motion under section 2255 of Title 28. *E.g. Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969); *see also Genovese* v. *United States*, 378 F.2d 748 (2d Cir. 1967); *United States* v. *Tomaiolo*, 378 F.2d 26, 28 (2d Cir.), *cert. denied*, 389 U.S. 896 (1967).

The hearsay allegations, advanced for the first time, that witnesses were led past defendant and his trial counsel in a public corridor of this building prior to trial require no hearing. *See United States* v. *Birnbaum*, Docket No. 33815 (2d Cir. Feb. 3, 1970); *Dirring* v. *United States*, 370 F.2d 862, 865 (1st Cir. 1967); *D'Errole* v. *United States*, 361 F.2d 211, 212 (2d Cir.), *cert. denied*, 385 U.S. 985 (1966); *United States* v. *Keogh*, 271 F. Supp. 1662, 1668 n.22 (S.D. N.Y. 1967), *modified*, 391 F.2d 138 (2d Cir. 1968). And even assuming the incident did occur, obviously it was known to the defendant and his trial counsel when those witnesses testified and were subjected to thorough cross-examination on the issue of identification.

The motion is denied in its entirety.

Dated: New York, N. Y.
February 16, 1970

EDWARD WEINFELD
United States District Judge

Memorandum Decision of Hon. Edward Weinfeld.
December 12, 1969

69 Civil 3350

The attached application has not been verified. Too many applications have recently been submitted in disregard of the Rules. Rule 28(b), General Rules of the Southern District; 28 U.S.C. § 2242 (1964).

The motion is denied.

Dated: New York, N. Y.
December 12, 1969

EDWARD WEINFELD
United States District Judge

In

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 18—September Term, 1970.

(Argued September 14, 1970 Decided October 6, 1970.)

Docket No. 34638

THOMAS KAPATOS,

Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

FRIENDLY, SMITH and HAYS,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Edward Weinfeld, *Judge*, denying, without an evidentiary hearing, a motion under 28 U.S.C. § 2255 to vacate a conviction. Affirmed.

PATRICK M. WALL, Esq. (Theodore Rosenberg, Esq., Brooklyn, New York, of Counsel), *for Petitioner-Appellant.*

Opinion

JOHN M. WALKER, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and Peter L. Truebner, Assistant United States Attorney, of Counsel), *for Respondent-Appellee.*

FRIENDLY, *Circuit Judge*:

This is an appeal from an order of the District Court for the Southern District of New York denying, without an evidentiary hearing, Kapatos' third petition under 28 U.S.C. § 2255[1] to vacate his conviction, after trial before Judge Weinfeld and a jury in October 1966, for stealing an interstate shipment of jewelry on November 8, 1963.

The jewelry was in a station wagon bearing six messengers employed by AAA Jewelry Service—Moots, Figueroa, Kreisman, White, Tretter and Savoca. The station wagon was overtaken by a black sedan bearing two men dressed in police uniforms. One, allegedly Kapatos, directed Moots, the driver, to pull over and, on the latter's doing so, drew a pistol and said "Get out. This is a hold-up." Two more men, carrying pistols and wearing masks, positioned themselves on either side of the station wagon. As the six AAA employees emerged, they were ushered into a panel truck driven by a fifth man and were shackled and handcuffed by the two masked men. The black sedan followed the truck. With the bad luck that happily so often attends such ventures, the "policemen" were unable to

[1] We affirmed without opinion Judge Weinfeld's denial of the first petition, which raised a point different from that here at issue; certiorari was denied, 393 U.S. 852 (1968). Denial of the second petition rested on a technical ground which the third petition cured.

drive the station wagon because it had a standard gear shift which they did not know how to operate. One of them, a man who was between five feet ten and six feet in height, weighed between 180 and 200 pounds, and had a red crop of hair, approached Mullett, an iron-worker foreman who was working nearby, and asked whether he knew how to drive a standard shift car. Mullett answered affirmatively and went to the car, but on observing its contents and hearing a shouted warning from his fellow workers, he decided to have no part of the job.

The only substantial issue at Kapatos' trial was identification. The Government presented no other evidence connecting him wtih the crime, he did not take the stand, and the defense offered no alibi. With varying degrees of certainty, Kreisman, Figueroa, White and Moots made in-court identifications of Kapatos as one of the two men who had approached the station wagon. Thes were bolstered by reference to out-of-court identifications made by Kreisman, Figueroa, and White approximately two years after the robbery. Tretter and Savoca said they would not be able to identify the robbers if they saw them again. Mullett, two other iron-workers and a sidewalk frankfurter vendor testified that Kapatos was not the "policeman" who had solicited Mullett's aid, and a nearby shop-keeper testified he was not the man who had hurriedly bought a jacket some six hours later. The Government explained this testimony by asserting that Kapatos, who apparently bore no resemblance to Mullett's description, was the other "policeman."

The defense naturally attacked the identifications. It brought out that shortly after the robbery a New York City policeman had accumulated photographs of various suspects, including Kapatos; that he had handed these to one Orbach, an officer of AAA, with the request that Orbach

display them to the six messengers and that he made no arrests as a result. On its own examination of Kreisman, who made the most positive identification, the Government elicited that his first sight of Kapatos after the robbery was in November 1965 when two FBI agents took him to view Kapatos on Delancey Street underneath the Williamsburgh Bridge where Kapatos was working. Figueroa who, viewing Kapatos in court, could say only that Kapatos looked like the man who approached the AAA car, stated that in November 1965 two F.B.I. agents took him and Moots "to recognize" Kapatos and that he then thought Kapatos "was very much alike to that man who stop us." Moots was somewhat less sure. White thought Kapatos looked "very much like" the man who had approached the car. The Government brought out that in December 1965, F.B.I. agents had taken White to view Kapatos in front of a restaurant, and he had then made an identification. Cross-examination of Mullett disclosed that the F.B.I. had shown him a photograph of Kapatos, had taken him down to the north side of the Williamsburgh Bridge where Kapatos was working, and had asked him whether Kapatos "was the fellow who couldn't drive the stick shift." As indicated, Mullett's answer was negative. Practically the sole issue for the jury was the credibility of the identification testimony; the prosecutor said in summation that if the jurors didn't believe Kreisman, they should not convict.

An appeal was taken to this court. A principal point in appellant's brief was that "The prior show-up suggestive identification procedure under the circumstances was a flagrant violation of the 'due process of law' clause of the Fifth Amendment to the U. S. Constitution." The brief vigorously contended that the one-to-one exhibition of Kapatos to Kreisman, Figueroa, Moots and White was unduly suggestive and cited Mullett's testimony to support

this claim. The error was said to be "much more flagrant" than in *Wade* v. *United States*, 358 F.2d 557 (5 Cir. 1966), which then had not yet been reviewed by the Supreme Court. We affirmed without opinion.

A petition for certiorari was filed prior to the Supreme Court's decisions of June 12, 1967 in the *Wade-Gilbert-Stovall* trilogy, 388 U.S. 218, 263, 293, but the Government's memorandum and petitioner's reply brief were filed thereafter, and the latter made extensive reference to those cases. The brief supporting the petition argued, as had the brief in our court, that the identification procedures, especially the show-up of Kapatos to Kreisman under the Williamsburgh Bridge, were impermissibly suggestive and cited the lower court decisions in *Wade*, *Gilbert* and *Stovall*. The Court denied certiorai on October 9, 1967, 389 U.S. 836.

The instant petition under 28 U.S.C. § 2255 was founded on three affidavits, one by Isidore Zimmerman, an investigator employed by Kapatos' counsel, another by Mullett, and a third by Theodore Rosenberg, co-counsel at Kapatos' trial and his counsel in this proceeding.[2] All that Mullett's affidavit added to his trial testimony was that when he was taken to the construction site under the Williamsburgh Bridge, the agents told him not simply that he was to look at a suspect, which was surely inferable from his testimony, but that they thought they had "a very good suspect," who would be pulling up in a car they described, and also that there was an attempted voice identification—all, as stated,

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[2] Rosenberg stated that Lopez, the other trial counsel, told him that prior to the trial Lopez was standing with Kapatos in front of a courtroom in the Federal Courthouse when the courtroom door opened and a Federal agent led the Government witnesses past them. This episode, which of course was well known to defendant and his counsel, had been brought out at the trial, and is not of sufficient significance to require further discussion.

unsuccessful. After interviewing Mullett, Zimmerman went to AAA's office, where he encountered Orlach, Moots and Figueroa. The two later reminded Zimmerman that they did not positively identify Kapatos. When Zimmerman asked whether they were influenced in any way by the F.B.I. in the identification on Delancey Street, Orlach refused to let them answer but they allegedly said, "I did not identify the defendant at Delancey Street." Zimmerman was unable to locate Figueroa afterwards, and White refused to give any information without clearance from the F.B.I. and the United States Attorney. Although he promised to call Zimmerman after receiving such clearance, he never did; whether he ever called the F.B.I. or the United States Attorney, we do not know. A visit by Zimmerman to Moots' home was unproductive. Kreisman also declined to answer the investigator's questions. Judge Weinfeld denied the petition without an evidentiary hearing, and this appeal followed.

In *Sanders* v. *United States*, 373 U.S. 1 (1963), the Supreme Court, dealing with the provision of § 2255 that "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner," held that this should not be read so as to apply a res judicata standard to successive applications by federal prisoners. Rather the provision "is to be deemed the material equivalent of § 2244" (dealing with successive habeas corpus petitions by state prisoners), 373 U.S. at 14. In either case, the denial of a prior petition may serve as the basis for refusing a hearing on a later petition only if three conditions are met: (1) the ground urged in both applications must be the same (2) it must have been determined adversely to the applicant on the merits on the prior petition; and (3) reaching the merits on the sub-

sequent application would not serve the ends of justice, 373 U.S. 15.

Six years later in *Kaufman* v. *United States*, 394 U.S. 217, 227 n. 8 (1969), the Court indicated that the *Sanders* criteria would govern a § 2255 petition setting forth claims which had earlier been urged and determined adversely to the petitioner at the trial and appellate levels. In that case the claim had been raised and ruled against at trial and, although counsel elected not to press it on appeal, Kaufman himself had brought it to the attention of the appellate court, which, however, did not mention the point in its opinion.[3] See 394 U.S. at 220 n. 3. Mr. Justice Brennan disposed of the "bald statement, variously expressed, that a motion under § 2255 cannot be used in lieu of an appeal" on the basis that this did not apply to constitutional claims, 394 U.S. at 222-23. However, he qualified this by saying that "[W]here a trial or appellate court has determined the federal prisoner's claim, discretion may in a proper case be exercised against the grant of a § 2255 hearing," by referring to the *Sanders* criteria, and by adding that "where the trial or appellate court has had a 'say' on a federal prisoner's claim, it may be open to the §2255 court to determine that on the basis of the motion, files, and records, 'the prisoner is entitled to no relief.'" 394 U.S. at 227 n. 8. Both in the footnote and at 394 U.S. 230-21, he cited with approval Judge J. Skelly Wright's dissent in *Thornton* v. *United States*, 368 F.2d 822, 831 (D.C. Cir. 1966). There, after a somewhat similar statement, Judge Wright posed four cases that in his view would require § 2255 relief despite a previous opportunity to

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[3] A note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1064-66 (1970), suggests that this uncertainty whether the court of appeals considered Kaufman's claim is the reason why the Supreme Court allowed relitigation.

ventilate or even actual ventilation of a constitutional claim. These were: (1) where a federal trial or appellate court said nothing because the issue was not raised; (2) where it was unclear whether the 'say' was on the merits; (3) where new law had been made or facts uncovered relating to the constitutional claim since the trial and appeal; and (4) where the trial or appellate court based its rulings on findings of fact made after a hearing that was not full and fair.

Kapatos' case does not fall under any of these rubrics. The issue of impermissibly suggestive identification was clearly raised in the briefs to this court, and our negative 'say', even though not expressed in an opinion, must have been on the merits. The hearing at Kapatos' trial was full and fair. Kapatos concedes that the principles first enunciated in *United States* v. *Wade*, 388 U.S. 218, and *Gilbert* v. *California*, 388 U.S. 263, do not apply to his case. He does assert, however, that the opinion in *Stovall* v. *Denno*, 388 U.S. 293, "advanced an innovated concept regarding a due process violation with respect to a pretrial identification procedure." But the *Stovall* opinion does not read as if the Court thought it was making new law in holding that an impermissibly suggestive identification violated due process. It referred to this as "a recognized ground of attack upon a conviction independent of any right to counsel claim," 388 U.S. at 302, citing *Palmer* v. *Peyton*, 359 F.2d 199 (4 Cir. 1966), and indicated that for that very reason state convictions already final were still subject to attack by federal habeas on that basis although not for violation of the newly announced line-up rules.

We are thus left only with the asserted discovery of new evidence relating to the constitutional claim. If the petition had alleged any new evidence that would have significantly buttressed the claim of impermissibly suggestive identifica-

tion, and if this was not discoverable before the trial in the exercise of reasonable diligence, we would indeed direct a hearing; a conviction resting solely on identifications alleged to have been impermissibly suggestive ranks high on the list where re-examination on collateral attack is warranted if a sufficient basis is shown. *Cf. United States v. Miller*, 411 F.2d 825 (2 Cir. 1969). But the petition here did not measure up to that standard. While it added some details as to F.B.I. conduct with respect to Mullett, these could readily have been developed on cross-examination at the trial and, in light of Mullett's trial testimony that Kapatos was not the man who approached him, no harm was done in any event. What we are asked to conclude is that the likelihood of the agents' having made the same kind of remarks to Kreisman and the other three identification witnesses is sufficient to call for a hearing. But even if a hearing were to show that similar remarks were made, which is sheer speculation, this would have added little to what the jury already knew about the suggestive nature of the pre-trial identifications, and the whole subject of what the agents said to the four witnesses at their respective pre-trial confrontations with Kapatos could readily have been developed.[4] We read the remark allegedly made by Figueroa and Moots to Zimmerman as saying only that they had been no more positive on Delancey Street than they were in court—not that they were recanting testimony they had given. Here again the whole matter of their prior identifications was on the record and could have been explored at trial if defense counsel had so chosen. In sum, the petition leaves us with no more belief than was entertained by the able and conscientious district judge that a

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[4] Since the Government had brought out the prior one-to-one identifications, the defense had nothing to lose by probing into the circumstances.

hearing would add anything of significance to what was or could have been developed at the trial over which he had presided.

We thus find no mandate in *Kaufman* for allowing further litigation of the very claim of impermissibly suggestive identification that was decided against Kapatos when, some months after *Stovall*, the Supreme Court declined to review our affirmance of his conviction. Cf. *Slawek* v. *United States*, 413 F.2d 957, 959 (8 Cir. 1969) (Blackmun, *J.*); Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1064-66 & n. 144 (1970).

Affirmed.

Excerpts from Testimony of Trial Record

Kreismann

(Tr. 65) * * *

Q. Did you and your fellow co-workers from the Triple A ever come to court around August of this year in connection with this particular case? A. In court?

Q. Yes, in court, on the 13th floor or on the 11th floor? A. Oh, yes.

Q. You did? At that particular time did you ever see the defendant, Kapatos, in the hallway? A. Yes, I did.

On direct

(Tr. 37) * * *

Q. Now, I direct your attention to November of last year, 1965, and I ask you whether you saw this man here you've just identified? A. Yes, sir.

Mr. Lopez: Objection, your Honor.

The Court: Overruled.

Q. Can you tell us the circumstances in which you saw him? A. Yes.

Mr. Lopez: Your Honor, may I have a continuing objection as to all this testimony to prior identification?

The Court: Yes.

Q. Let me ask you this: Where did you see him, Mr. Kapatos? A. I saw him on Delancey Street, underneath the Williamsburgh Bridge.

Q. And was this in the day time or in the evening? A. In the day time.

(Tr. 38)

Q. Were you in anybody's company at that time? A. Yes, sir, I was.

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* Reference to pagination of Transcript of Trial Record.

Excerpts from Testimony of Trial Record

Q. Who might they be? A. Two F.B.I. agents.

Q. Is it true, Mr. Kreisman, that they asked you to look at this man?

Mr. Lopez: Objection, your Honor, leading.

The Court: Objection sustained.

Q. What did you do, Mr. Kreisman? What happened? A. What happened? The F.B.I. parked the car there and they told——

Mr. Lopez: Objection.

The Court: Objection sustained, not what they told him.

Q. Did there come a time when you did see him in the company of two F.B.I. agents? A. Repeat the question.

Q. Did there come a time that day when you saw the defendant when you were in the company of two F.B.I. agents? A. Yes.

(Tr. 38-39)

A. Yes.

Q. When you saw him, did you tell the F.B.I. agents that that was the man who was wearing the policeman's uniform, who got out of the car, who stuck you up on November 8, 1963? A. Yes, I did.

Prosecutor's Summation

(Tr. 427).

If you don't believe Kreisman, then I don't think you should convict.

Figueroa (Tr. 115)

Q. Did you see the one driving? A. No, because he was covering him with his body.

(Tr. 119)

Q. Now, I direct your attention to November of last

year, 1963. Did you have occasion to see this man who you've just identified then; did you see him then? A. Yes.

Q. Was anybody with you when you saw him at that time? A. Louis Moots.

Q. Was there anybody else? A. Two agents of the F.B.I.

Q. Did you tell the agents of the F.B.I. anything when you saw this man?

Mr. Lopez: Objection.

The Court: Objection sustained.

• • • • •

The Court: Objection sustained. Subsequent to November 8, 1963, did you see this man on any other occasion?

The Witness: After 1963 I don't think I saw him, but I only want to clarify.

• • • • •

(Tr. 120)

The day that they took me to recognize him, I can, only say that the day they took me to recognize him it seems to me that he was very much like to that man who stop us.

Mr. Lopez: I move to strike out all of his testimony as to the identity of this particular defendant, your Honor.

The Court: Objection overruled.

Q. This man that you have identified here in court today, you say that you saw him at a time after the robbery when you were with the F.B.I. agents? A. Yes, I saw him.

• • • • •

(Tr. 121) Cross

• • • • •

Excerpts from Testimony of Trial Record

Q. Now, Mr. Figueroa, when you were asked by Mr. Gold if you could identify any person in this particular courtroom as one of the persons who were involved in holding up the AAA Jewelry station wagon in which you were a passenger, you said that you saw a person that appeared to be, is that correct, appeared to be one of the perpetrators, is that true? A. Yes.

Q. But you were not positive, is that also correct?

(Tr. 122) • • •

Q. I ask you yes or no, are you positive that that man, Kapatos, as he sits there, is the man you saw in the policeman's uniform? A. I can only say that he looked like exactly that man.

Q. So that you can't say positively he is the man, is that right? A. I can't tell you 100 per cent, but many people look like other people and I saw him only that one day.'

(Tr. 142)

"Now, I recall exactly. The same day they took us to Delancey Street, before, before leaving Precinct."

JOHN WHITE—Direct.

(Tr. 152)

• • • • • •

Q. Now, I want you to stand up, Mr. White, and I want you to take a slow and careful look around this courtroom and I ask you whether you see anybody here today whom you recognize as a participant in the robbery that took place on November 8, 1963? A. I see a man who looks similar to the policeman. • • •

(Tr. 153-54)

Q. Now, this man who you've just looked at in this courtroom today, did there come a time after this robbery when you saw this man again? A. Yes.

(Tr. 154) • • •

Q. When was that? A. I was asked——

Q. I just asked you when? A. It was sometime in the winter, approximately around, I imagine, December.

Excerpts from Testimony of Trial Record

The Court: December of what year are you referring to?

The Witness: 1965.

Q. Were you in the company of F.B.I. agents at that time? A. Yes, I was.

Q. Did you recall the location? A. The location?

Q. Where you saw this man? A. It was somewhere on the West Side. I remember the name of the restaurant that he was in front of. It was the Homestead, if I am not mistaken.

Q. Did you identify him at that time? A. Yes, sir.

Mr. Lopez: Objection, your Honor.

Mr. Gold: I don't see how I could possibly get this out. I have tried all the words I know.

Q. Did you recognize this man when you looked at him? (Tr. 155) A. Yes, I did. I looked at him and he fit the description of the policeman.

Q. The description that was in your mind? A. Yes, in my mind.

The Court: The policeman you saw on November 8, 1963?

The Witness: Yes.

* * * * *

(Tr. 160) Cross

* * * * *

Q. Now, as you sit there and ask you stand in this courtroom, are you positive that the defendant Kapatos is the one that was dressed in the policeman's uniform on November 8, 1963? Can you say "I am positively sure"? A. I can't say that.

Excerpts from Testimony of Trial Record

(Tr. 49) KREISMAN—Cross

Q. Did McGerald also show you some photographs? A. I believe he did, yes.

Q. On any occasion? A. I am not altogether clear on who particularly showed me photographs, but I was shown quite a few photographs.

Q. Quite a few? A. Right.

Q. Of all those particular photographs, were you ever able to identify any particular persons as one of the assailants that stopped the vehicle and robbed it? A. From the Police Department, no.

Tr. p. 311—Orbach Cross

In respect to photos shown to the victim of the crime, the Court questioned Orbach at page 311:

> "The Court: Do I understand your testimony that they were shown repeatedly to each individual messenger?
>
> The Witness: Yes, as much as I recollect."

Direct for Defendant—Tr. pp. 365, 367

Detective James Francis McGerald testified as follows:

> "Q. Did you ever show them photographs of suspects or people that they could possibly identify? A. Yes, I did.
>
> Q. At the 14th Squad, did you show them photographs? A. I did.
>
> Q. Did you show them photographs at any other place? A. After the first two weeks, photos were sent in to me from different departments, New Jersey, Westchester County, and from the different squads in our department, and I would go to 103 Nassau Street, the office of AAA, and there present them to Larry Orbach, because the messengers were

always en route. I would give them the photos and two or three days later or sometimes the same day I would go back and he gave me a negative answers.

Mr. Lopez: Mr. Kapatos, please stand.

Q. I ask you to look at this man named Kapatos and ask you if you at any time ever showed the messengers of the AAA Jewelry Service any photographs of this man? A. I did.

Q. Would you tell us the circumstances under which you showed it to them? A. As a result of a telephone call from the borough office Manhattan Borough office, under Assistant Chief Herring, the clerical man told me that Lieutenant Sullivan assigned, I believe, to the Manhattan Homicide Squad, had two suspects. He gave me the name of Donahue and Kapatos.

Q. As a result of that, did you receive photos of Kapatos and Donahue? A. The clerical man told me he would send them to the 14th Squad. As a result I got the photos and I then turned around and went back to Larry Orbach, owner of the AAA. I left the photos there and I returned a little later, the same day or a few days later, and he told me——

Mr. Gold: Objection to what Orbach said.

The Court: Yes.

Q. As a result of that conversation with Larry Orbach, did you make an arrest in this particular case? A. I did not.

Q. As a result of that particular conversation with Larry Orbach, was Kapatos a suspect in this particular case so far as you were concerned? A. No."

Verified Statement of Isidore Zimmerman, Investigator

State of New York,
County of Kings, ss.:

ISIDORE ZIMMERMAN, being duly sworn, deposes and says:

That he is an investigator employed by Theodore Rosenberg, Esq., of 133 Schermerhorn Street, Brooklyn, New York, assigned to interview Louis Moots, Victor Figueroa, John White, Max Kreisman and James R. Mullett, in connection with the particulars surrounding a pre-trial identification procedure in the case of *United States* v. *Thomas Kapatos*.

That on July 7, 1969, your deponent interviewed James R. Mullet, Business Agent, Structural Iron Workers, Local 40, with an office at the Broadway Central Hotel, 673 Broadway, New York, N. Y.

That on July 18, 1969, your deponent visited the office of the A.A.A. Jewelry Messenger Service, 93 Nassau Street, New York, N. Y., and encountered Mr. Larry Orbach, Louis Moots and Victor Figueroa.

The interview with Louis Moots and Victor Figueroa on this date proved that we cannot get any cooperation from Larry Orbach or the other two aforenamed persons, who work for him.

Mr. Orbach did not allow Mr. Moots and/or Mr. Figueroa to be questioned and would not allow a written, signed statement to be made.

Both Figueroa and Moots claim, on the identification theory, they did not positively identify Kapatos but said, "It looks like him". Deponent inquired as to whether they were influenced in any way by the F.B.I. on the identification when they were taken to Delancey Street to view Kapatos, from a distance. Mr. Orbach refused to let them answer. However, both witnesses blurted out, "I did not identify the defendant at Delancey Street'.

Later, they claimed the only thing the F.B.I. had told them, when they were picked up at their 45th Street office,

was, "We have a suspect we would like you to identify". Pressed on that point, they insisted that was all the F.B.I. told them.

At the time of the identification on Delancey Street, Mr. Orbach was physically present.

(It may be a good idea to subpoena these people.)

Orbach also refused to give or disclose Kreisman's address. However, he did say Kreisman does not work for him any more.

On July 28, 1969, deponent went to the last known address of Victor Figueroa at 1694 Lexington Avenue, New York, N. Y. and after a diligent search of the area was not able to contact Mr. Figueroa. Information from the superintendent of that building was that Mr. Figueroa had moved to an unknown address in New Jersey.

On July 30, 1969, deponent visited the home of John White, 283 Macon Street, Brooklyn, New York, and Mr. White told your deponent that he would not answer any questions or give any information until he cleared it with the F.B.I. and the United States Assistant Attorney, Mr. Gold. Mr. White promised to call your deponent at the office of Theodore Rosenberg, Esq., when he would receive such clearance. To date, Mr. White has not contacted your deponent.

On August 7, 1969, deponent visited the home of Louis Moots, in Richfield, New Jersey. Mr. Moots refused to make any statement to deponent.

On August 12, 1969, deponent went to the home of Max Kreisman, 2609 Hubbard Street, Brooklyn, New York, identified himself as an investigator for Theodore Rosenberg, Esq., and explained that he wanted a statement as to what transpired at the time of the pre-trial identification at the construction site where Thomas Kapatos was employed on

Verified Statement of Isidore Zimmerman, Investigator

November 18, 1965, on Delancey Street, New York, N. Y. Mr. Kreisman stated that he would not answer any questions.

Respectfully submitted,

(Sgd) ISIDORE ZIMMERMAN
5200 39th Avenue
Long Island City, N.Y.C.

Sworn to before me this
8th day of January, 1970.

.....
Notary Public

Verified Statement of J. Raymond Mullett, Witness

My name is JAMES RAYMOND MULLETT. I am a Business Agent of the Structural Iron Workers, Local 40, located at the Broadway Central Hotel, 673 Broadway, New York City. I live at 1785 East 34th Street; telephone number 336-5271.

I make this statement of my own volition.

I believe, sometime in November of 1965, some F.B.I. Agents called me at my office, asked me if I would be available to look at a suspect. A couple of days later, two or three Agents met me at my office; we went down to a car they had parked downstairs. They explained to me they wanted me to look at a suspect as he arrived at work at a construction site under the Williamsburg Bridge at Delancey Street, N.Y.C.

After I got into the car, I was informed we had some time to waste as the suspect was driving in from New Jersey.

We drove down to a coffee shop in the area of Water and Wall Streets and over a cup of coffee we chatted for about 15 minutes. During this conversation, one of the agents, his first name was Joe, second name unknown to me, said, "We have a very good suspect". At the end of this conversation it was suggested we had better get over to the job site. When we got into the car, word came over the radio that the suspect had come through the Lincoln Tunnel and was driving to his job.

They dropped me off at the job site. They went up a block and parked their car. They had explained to me that the suspect would be pulling up in what I believe was a light green Pontiac. I could be wrong as to the color and name of the car, however, they did describe it to me. They further told me where he would park the car and the entrance he would use to get to the job site.

In just about a minute, the car that was described to me by the F.B.I. Agents pulled up and parked; a man whom I later found out was Kapatos got out of the car

and as I observed him walk to the job site, passing within 25 feet of me, and entered the job site. I then turned and walked West in the direction of the Agents' car, was met by one of the Agents who asked me, if that was the man I had seen in the robbery, I replied: "No".

I then proceeded with this Agent up to their automobile; we got into the car and again was asked if this was the man and again I replied: "No". As we were talking, Kapatos pulled up abreast of us in his car, which was previously described, and started talking to the Agents and they in turn with him. It was a meaningless conversation; I think mostly to let me hear his voice. The Agents asked me if I recognized his voice. I said, "That the man who spoke to me at the robbery site spoke like a New Yorker and this man had the accent of a Jerseysite". They kept abreast of Kapatos' car going West on Houston Street. They kept the conversation going and again asked me, "Are you sure this isn't the voice you heard?" Again I replied, "No". Kapatos turned North on 6th Avenue. We followed until Kapatos parked at a gas station across the street from the Homestead Restaurant at 16th Street and 10th or 11th Avenue.

We kept going and they brought me back to my office.

The only names I knew of the F.B.I. Agents were "Joe" and "Bob".

I have read pages one to five (handwritten copy) and this is a true account of the day the F.B.I. Agents brought me down in an attempt to identify Thomas Kapatos.

I can't remember the exact date.

JAMES R. MULLETT

Sworn to before me this
..... day of January, 1970.

.....
Notary Public

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Supreme Court of the United States

October Term No. 916

THOMAS KAPATOS,
Petitioner-Appellant,

—*against*—

UNITED STATES OF AMERICA,
Respondent-Appellee.

PETITION FOR A WRIT OF CERTIORARI

THEODORE ROSENBERG,
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133 Schermerhorn Street,
Brooklyn, New York 11201.

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Supreme Court of the United States

October Term No. .....

THOMAS KAPATOS,

Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,

Respondent-Appellee.

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the adjudication of the United States Court of Appeals for the Second Circuit rendered on October 6, 1970.

Opinions Below

In respect to this proceeding, on December 12, 1969, the Hon Edward Weinfeld, U.S.D.J., Southern District, New York City, N. Y., denied an application pursuant to Section 2255 of Title 28. The memo decision is set forth in the appendix (69 Civil 3930). The procedural defect was thereafter cured and the papers again submitted. On February 16, 1970, Hon. Edward Weinfeld denied the application pursuant to Section 2255 of Title 28 without calling for an evidentiary hearing. The decision is set forth in the appendix (70 Civil 166). An appeal was taken to the United States Court of Appeals for the Second Circuit. On October 6, 1970, the Court unanimously affirmed the court below. A copy thereof is set forth in the appendix (Docket No. 34638).

United States Constitution

Due process of law clause of the Fifth Amendment.

Compulsory process for obtaining witnesses as contained within the Sixth Amendment.

Prior Proceedings

January 14, 1966, Ind. No. 66 Cr. 34, containing two counts, was filed against petitioner, Thomas Kapatos. Petitioner was arrested on January 17, 1966.

Count One charges that on November 8, 1963, petitioner, Kapatos, stole an interstate shipment of jewelry in violation of Title 18 United States Code, Section 659. Count Two alleged a conspiracy charge relative to Count One.

Trial commenced on October 3, 1966. At the conclusion of the Government's case, counsel for Kapatos motioned for judgment of acquittal on both counts of the indictment. The motion was denied as to the substantive count; and in respect to the conspiracy count, the motion was granted.

Upon a verified petition on October 10, 1966, counsel for Kapatos submitted a motion for a new trial and arrest of judgment. Motion was denied on October 28, 1966, by the Hon. Edward Weinfeld.

On October 28, 1966, Hon. Edward Weinfeld, sentenced Kapatos to imprisonment for a term of seven and one-half years. Kapatos is presently serving the sentence in the Federal Penitentiary at Atlanta, Georgia.

The U. S. Court of Appeals, Second Circuit, affirmed the judgment of conviction unanimously on March 15, 1967 without opinion (Docket No. 30967). Certiorari was de-

nied on October 9, 1967 (*Kapatos* v. *United States*, 385 U.S. 836 (1967).

A motion under Section 2255, on a different issue, was filed on October 4, 1967. It was denied by Judge Weinfeld on November 30, 1967 (67 Cir. 3847); the U. S. Court of Appeals, Second Circuit, affirmed without opinion on April 23, 1968 (Docket No. 32028; Certiorari was denied on October 14, 1968 (*Kapatos* v. *United States*, 393 U.S. 852 (1968).

Questions Involved

1. Is petitioner entitled to an evidentiary hearing upon contentions that at a pre-trial surreptitious identification there were suggestive characterizations irreparably tainting the constitutional propriety of the identification as contemplated by due process of law?

2. Is petitioner entitled to proceed by Section 2255 Title 28, United States Code, for an evidentiary hearing to establish a fundamental constitutional infirmity in the pre-trial identification process that utterly lacked the promulgated standards regarding pre-trial identification procedure set forth in the *Wade-Gilbert-Stovall* trilogy?

3. Does the denial of an evidentiary hearing violate the Sixth Amendment clause, "to have compulsory process for obtaining witnesses in his favor" where prospective witnesses decline to make any statements to petitioner's investigator?

The Issue

In the instant proceeding, petitioner specifically urged that the in-court (trial identification) was irreparably and illegally tainted by improper pre-trial "show-ups" conducted surrepitiously by government agents (FBI) which deprived him of due process of law. This proceeding was instituted on the concept that the case occurred before the advent of the principles enunciated in *United States* v. *Wade*, 338 U.S. 218 *Gilbert* v. *California*, 388 U.S. 263, and *Stovall* v. *Denno*, 388 U.S. 293. Petitioner particularly urged that he be accorded an evidentiary hearing so as to enable him to affirmatively establish that the pre-trial identification procedure was grievously tainted by a constitutional infirmity in that the identification process was suggestive and violated the concept of due process of law. Appellant presented facts *dehors* the trial record to substantiate the requirements of an evidentiary hearing.

The Trial

On November 8, 1963, at approximately 12:30 p.m. at 41st Street between 11th and 12th Avennes, in New York City, the crime of robbery was perpetrated upon a station wagon bearing six employees of the AAA Jewelry Service. Relative to the instant proceeding petitioner will confine himself exclusively to the issues herein.

The six messengers testified that they were travelling in a westerly direction in the AAA Jewelry station wagon on West 41st Street between 11th Avenue and West Street. They had departed a few minutes earlier from the firm's branch office at West 47th Street, and were bound for the AAA's main office on Nassau Street. In the front seat of the vehicle, from left to right, were Louis Moots, who was driving, Victor Figueron, and Max Kriesman, the manager of the 47th Street office. John White was riding in the back seat with Rudy Tretter and Thomas Savoca.

As the station wagon neared the middle of the block it was overtaken by a black sedan on the driver's side, accompanied by its driver and a passenger. Both men allegedly were dressed in police uniforms. It was testified that the petitioner directed Moots to "pull over"; Moots immediately complied with the order; petitioner alighted from the sedan, approached Moots' window and, as he reached it, drew a pistol. Moots inadvertently removed his foot from the clutch pedal while the vehicle was still in gear causing it to lurch forward a bit and then stall. Petitioner pointed his pistol and stated "Get out. This is a hold-up." At the same time two more men, carrying pistols and wearing Halloween masks and overalls appeared and positioned themselves on either side of the station wagon. As the six victims emerged from the two left doors of the station wagon, they were confronted by another vehicle, a panel truck, under the control of a fifth person. The messengers were urged to enter the panel truck and were joined by two masked men who shackled them in handcuffs to slats running along the interior of the truck. The original black sedan followed the truck.

The Identification Procedure

Max Kreisman identified petitioner as the perpetrator who emerged from the passenger side of the black sedan that stopped three feet parallel from the station wagon. He identified him in court on October 3, 1966, and, in a surreptitious confrontation on Delancey Street, under the Williamsburgh Bridge on November 18, 1965, while being accompanied by two Federal agents.

Counsel for the petitioner vigorously objected to the introduction of the pre-trial identification on the premise that it unfairly tended to bolster the in-court identification and should therefore have been excluded. He requested the court for a continuous objection on all evidence in relation to the pre-trial identification. The evidence adduced at the

trial with respect to the pre-trial identification is set forth in the *Appendix*, as to each of the witnesses. Inasmuch as the trial had occurred before the teaching promulgated in the cases of *Wade* v. *United States; Gilbert* v. *California* and *Stovall* v. *Denno*, all cited supra, Appellant has moved through the medium of Title 28 U.S.C. § 2255 for post-conviction relief, and has endeavored to secure evidence to establish that the pre-trial identifications were obtained by suggestive actions that tainted their validity, and egregiously affected the in-court identification to the extent that Appellant was denied the fundamental right to be convicted by due process of law.

Further Investigation

Counsel retained the services of an investigator, Isidore Zimmerman, to inquire of the Government's witnesses as to the specific events concerning the identification procedure prior to trial. *See*: *Appendix*, p. 20a, constituting Isidore Zimmerman's verified statement. Mr. Zimmerman interviewed one of the People's witnesses, Raymond Mullett, and his verified statement is set forth in the *Appendix*, p. 23a. Mr. Mullett gives a graphic account of what transpired at the pre-trial identification procedure that illustrates the criterion employed by the F.B.I. agents. In substance, the F.B.I. agents told Mullett, "We have a very good suspect." The suspect was driving from New Jersey and that "word came over the radio that the suspect had come through the Lincoln Tunnel and was driving to his job." *"They explained to me that the subject would be pulling up in * * * a light green Pontiac."* They further told him where he would park his car, and the entrance he would use to get to the job site. The agents also did endeavor to obtain a voice identification. Mr. Zimmerman, on July 18, 1969, visited the office of the A.A.A Jewelry Messenger Service at 93 Nassau Street, New York City, and encountered Mr. Larry Orbach, the manager, and Louis

Moots and Victor Figueroa, who were victims of the robbery. Mr. Orlach did not allow Mr. Moots and Mr. Figueroa to be questioned, and would not allow a written signed statement to be made. However, both Figueroa and Moots *blurted out* "I did not identify the defendant on Delancey Street." Zimmerman then visited the home of John White, who was also a victim of the robbery, and Mr. White informed him that he would not answer any questions or give any information until he cleared it with the F.B.I. and the Assistant United States Attorney, Mr. Gold. He promised to call the office of counsel, but he never did. On August 7, 1969, Mr. Zimmerman also saw Max Kreisman, who also was a witness for the People, and Mr. Kriesman indicated that he would not answer any questions. It was vital at a trial hearing that the aforesaid witnesses, who testified as to the pre-trial identification, would disclose what transpired and whether they had been influenced in making their identification of Appellant. A hearing could have resolved this issue. Mullett's statement demonstrates a very serious impropriety in the suggestive activities of the F.B.I. agents.

The Totality of Circumstances in Relation to Appellant's Identification

A. Crime incident occurred on November 8, 1963.

B. The pre-trial identification procedure had taken place in November, 1965.

C. The perpetrators were unknown to the victims.

D. The crime incident was of extremely short duration and presented inadequate opportunity for positive identification.

E. The perpetrator was attired in a full police uniform. *Appellant was observed in laborer's clothes at the site of his employment.*

F. The physical positions of the victims were such as to deny them an adequate opportunity to properly view or identify the perpetrator.

G. Discrepancies between in-court identification and original descriptions given on the day of the crime.

H. Photos of Appellant shown to the A.A.A victims by New York City police shortly after the robbery were negatively received and not identified by the victims. (See Appendix, p. 18a).

I. The pre-trial "show-up" identifications were introduced as part of the evidence-in-chief at Appellant's trial.

J. The prosecution had conceded in another proceeding, unrevealed knowledge of statements made by witnesses (the Joyce brothers), which *unequivocally stated that the person Kriesman identified was the same person that other witnesses had categorically stated was not the Appellant.*

K. Appellant's photograph was published in news media and on television, contrary to proper ethical atmosphere of justice.

L. Shortly prior to trial Appellant was again subjected to a surreptitious viewing by prospective Government witnesses. This incident occurred during a court appearance just prior to Appellant's trial. The prospective Government witnesses were deliberately led past Appellant and allowed to view him while he unknowingly, unknowledgably, stood in the corridor of the Federal Courthouse. Kreisman testified that he observed Appellant in the corridor of the Federal Courthouse (Tr. 65).* *See*: *Appendix*, p. 13a.

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* Denotes pagination of Stenographic Minutes of Trial.

M. Two years elapsed between the crime incident and the pre-trial identification.

The evidence adduced at the trial with respect to the pre-trial identification procedure does not portray the factual details as to what transpired at the site of the identification before trial. Therefore, a hearing on this fundamental issue is indispensable to due process of law.

Kreisman's Pre-Trial Identification

The salient testimony by Kreisman relative to the pre-trial identification procedure and certain pertinent aspects thereof will herein be emphasized. The verbatim testimony will be set forth in the *Appendix*, at p. 13a.

Kreisman was crouched in the extreme right front of the station wagon. He was the only witness that testified that the driver of the black sedan was dressed in a police uniform. When he emerged from the station wagon he did not see the black sedan any longer (Tr. 32).

Kreisman made an in-court positive identification. However, he further testified that he was accompanied by two F.B.I. agents and brought to the site of petitioner's employment on Delancey Street underneath the Williamsburg Bridge in the daytime, where he had identified Appellant (Tr. 38). The record is completely devoid of the manner in which Kreisman identified the petitioner on Delancey Street. It could be reasonably inferred that there was a surreptitious confrontation.

When asked whether he had been shown photographs by the New York City Police Department, Kreisman responded that he had, and when asked if he had made an identification, he responded "From the Police Department, no" (Tr. 49, 52).

When asked if he had ever seen the Appellant in the hallway in the court before trial, he responded "Yes, I did" (Tr. 65) (13a).

Figueroa's Pre-Trial Identification

Figueroa testified that he was sitting between Moots and Kreisman; that someone came with a police uniform and ordered the station wagon to stop; that the person approached the station wagon dressed in a police uniform, and when asked if he was able to observe the person who was driving the black sedan, Figueroa responded "No, because he was covering him with his body." See *Appendix*, p. 14a (Tr. 116). (Apparently the policeman who emerged from the passenger seat and stood twelve inches away from Moots had precluded Figueroa from observing the driver of the black sedan).

Mr. Figueroa, on direct testimony, identified the Appellant, but stated "The day they took me to recognize him, I can only say that the day they took me to recognize him, it seemed to me that he was very much alike that man who stop us" (Tr. 120). See *Appendix*, p. 15a.

In November, 1965, Mr. Figueroa, accompanied by Louis Moots and two agents of the F.B.I. went to the site of Appellant's employment, and there identified Appellant. On cross-examination, Mr. Figueroa testified that he cannot positively identify petitioner, but, "I can only say that he looked like exactly that man." "I can't tell you 100 per cent, but many people look like other people, and I saw him only that one day" (Tr. 122). See *Appendix*, p. 16a.

John White's Identification

John White testified for the People, and when asked if he could identify the person who was a participant in the robbery that took place on November 8, 1963, he said "I see a man who looks similar to the policeman" (Tr. 152). See *Appendix*, p. 16a.

In December of 1965, in the company of F.B.I. agents, in front of the Homestead Restaurant in New York City, he identified the Appellant (Tr. 153-54). See *Appendix*, p. 17a.

When asked if he was sure as to the identification in court, Mr. White testified "I can't say that" (Tr. 160). See *Appendix*, p. 17a.

Statement

It is apparent that the record is inadequate as to what precisely transpired at the pre-trial identification procedure. Kreisman and Figueroa testified that they observed the petitioner while in the company of F.B.I. agents at the site of petitioner's employment, on Delancey Street, underneath the Williamsburgh Bridge. This identification was introduced at trial on direct testimony by the government. John White also testified that he was brought in the area of the Homestead Restaurant and there identified the Appellant in the street in front of the restaurant. He was also accompanied then by F.B.I. agents. This evidence, too, was introduced on direct examination by the Government. On the face of the record, regardless of the tenor of the argument, it could not effectively be demonstrated that any impropriety occurred in the pre-trial identification procedure. However, petitioner was certainly not accorded a fair line-up, and the manner in which the pre-trial identifications were obtained was fraught with the peril of an improper confrontation imbued with suggestive characteristics.

The Government will argue that Appellant had effectively developed the challenge of the pre-trial identification procedure in his trial appeal and therefore should be foreclosed from presenting this argument to Title 28 U.S.C. § 2255. The *Wade-Gilbert-Stovall* doctrine was not promulgated at the time Appellant went to trial, and therefore counsel could not foresee or contemplate its teachings.

Counsel objected to the inclusion of the pre-trial identifications solely because they tended to bolster the in-court identification, and was not aware of the gravamen of the impact of the pre-trial identification as to the probability of their being suggestive. This certainly should not foreclose petitioner from invoking Title 28 U.S.C. § 2255 to assail the constitutional validity of the pre-trial identification and its effect on the in-court identification.

It is further significant that trial counsel for the Appellant will testify that they were standing in the corridor outside the courtroom area, and that witnesses walked by petitioner and therefore had an opportunity to observe him. Kreisman, in his testimony (Tr. 65) confirms the episode of observing the Appellant in the court hallway *Appendix*, at p. 13a.

The investigator, Isidore Zimmerman, in his verified statement, states that he endeavored to secure statements from the witnesses as to what particularly transpired at the pre-trial identification procedure, and was met with opposition and silence. However, at one juncture Figueroa and Moots both *blurted out* to him "I did not identify the defendant on Delancey Street" which is definitely inconsistent with Figueroa's and Moots' testimony at the trial. See *Appendix* at pp. 15a, 16a.

This grave inconsistency necessitates the fundamental need for a judicial inquiry into the propriety of the identification.

Of paramount significance is Mullett's verified statement, wherein he described how the F.B.I. agents had informed him about petitioner coming to work, and how he would drive to the area, and where he would emerge,—all indicative of a suggestive nature.

The point is, if Kreisman, Figueroa and White were subjected to a confrontation coupled with suggestion at the pre-trial identification incident, it would constitute a grave constitutional infringement, and the conviction should thus be set aside.

The crux of the instant case is whether the conduct of the police at the pre-trial identification process was so inculcated with unnecessary suggestions as to be violative of *Stovall* v. *Denno*, 388 U.S. 293.

In this proceeding petitioner does not invoke the applicability of *Wade* v. *United States*, *supra*; *Gilbert* v. *California*, *supra*, inasmuch as the *Stovell* case specifically held that the *Wade-Gilbert* doctrine is not to be applied retroactively. *Petitioner relies exclusively upon the doctrine enunciated in Stovall* v. *Denno, cited supra.*

In a subsequent proceeding after the original appeal was determined by the United States Supreme Court, petitioner instituted a petition pursuant to Title 28, U.S.C. § 2255 with supporting affidavits from one of the Joyce brothers who observed the entire scene while working in the building across the street from the crime incident. It was his testimony that he observed the policeman emerge from the black sedan, approach the station wagon, and subsequently go into the car and try to drive it and, unable to do so, emerge therefrom and approach the witnesses Mullett and Carey and, after a brief conversation with them, walk west and disappear from view. This testimony

indicated that the person observed by Mullett and Carey and the frankfurter vendor was indeed the same person who emerged from the black sedan and perpetrated the robbery. They testified that the petitioner was positively not the person whom they saw. It was strenuously argued during the trial by the Government that the person whom Mullett, Carey, and the frankfurter vendor observed was not the petitioner but presumably the man who drove the black sedan. There is not a scintilla of evidence to substantiate this contention. This issue was raised solely to demonstrate that the evidence adduced at the trial, and the position taken by the Government, is fallacious, and that the identification issue even at the trial is in grave doubt.

Another aspect that must be considered as an element pertaining hereto is the fact that there was massive publicity in this case and that photographs of petition were printed in various news media, and that television also related petitioner's arrest. This was testified to in some degree by Kreisman, and certainly might have been influential in his identification.

There was a two-year period that elapsed between the crime incident and the pre-trial identification. Photographs of petitioner were shown to the victims of the crime shortly after the crime incident, and were rejected. Two years later there is an inference in the trial record that Kreisman had observed a photograph of petitioner and this sparked the investigation into the accusatory stage. Fundamental justice required, under the totality of the circumstances, that petitioner be accorded a fair and impartial line-up, which was not accorded petitioner in this case. In the instant case, the sole evidence adduced by the People was the identification. There was no other evidence tending to connect the petitioner with the crime.

The crime incident occurred in a very short duration of time, and the perpetrator was dressed in a full police uniform. Two years later, in laborer's clothes, in a confrontation set-up, petitioner is identified by three victims of the crime.

POINT I

Title 28, United States Code, Section 2255 is the appropriate medium for redress of the grievance complained of herein.

The court below denied petitioner's application for an evidentiary hearing on the ground that the issue may not be re-litigated by a motion under § 2255 of Title 28, and further held that the allegations advanced wherein the witnesses were led past the petitioner and his trial counsel in a public corridor of the courthouse required no hearing and, further held that even assuming the incident did occur, it was obviously known to the petitioner and his trial counsel when the witnesses testified and were subjected to thorough cross-examination on the issue of identification. This incident is herein related within the totality of the circumstances in order to stress the impropriety of the identification process, and constitutes a vital link in the chain of circumstances demonstrating the imperative need for an evidentiary hearing in the instant case.

It was held in *Wright* v. *United States*, D.C., 404 F.2d 1260:

> "on the other hand 'a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it', and the record on this appeal does not disclose some, and conceivably many, of the circumstances which may bear importantly on the due process issue. This undoubtedly is a consequence of the fact that this issue

> was not raised in the district court. That the question was not broached there is quite understandable since the principle giving rise to it appears to have enjoyed its first successful invocation in Federal litigation only after appellant's trial had been concluded, and in any event its added stature was not bestowed by *Stovall* until this appeal was pending."

In a habeas corpus proceeding, *United States ex rel. Roosevelt Stevenson* v. *Mancusi*, 409 F.2d 801, the court affirmed the vacatur of a state conviction on a prior conviction that the identification procedure was unfair and prejudicial, and constituted a violation of due process. The conviction assailed in that case was for a robbery in Illinois in 1932.

The trial record in the court below is completely barren of the particulars probing into the constitutional propriety of the pre-trial identification procedure. Predicated upon this inadequate record, counsel developed a challenge to the constitutional legality of the pre-trial identification procedure and though extensively projected, the facts bear out that the instant issue had not been re-litigated.

Title 28 § 2255 indeed would preclude the re-litigation of an issue that had been thoroughly presented and adjudicated on the original appeal. *United States* v. *Hayman*, 342 U.S. 205, 72 S. Ct. 263; *Sanders* v. *United States*, 373 U.S. 1, 83 S. Ct. 1068, and *Jordan* v. *United States*, 352 U.S. 904, 77 S. Ct. 151. The issue herein is of a constitutional magnitude, and certainly comes within the scope of § 2255; *Kaufman* v. *United States*, 394 U.S. 217.

Moreover, petitioner has advanced entirely new issues that had never been litigated in the court below. The *Stovall* doctrine, *supra*, advanced an innovated concept regarding a due process violation with respect to a pre-trial

identification procedure. The instant case preceded the *Stovall* case, and it is solely through the medium of § 2255 that petitioner could adequately move to obtain relief upon the premise advanced in the moving papers with respect to the issue herein. An evidentiary hearing is indispensable as due process of law. *Wright* v. *United States*, 404 F.2d 1256; *Smith* v. *United States*, 413 F.2d 366. It is submitted that a trial hearing on the issue herein will disclose that the pre-trial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable. *Appendix*, p. 12a, *Mullett's affidavit*. It is conceded that in the Appellate Court on the appeal, the issue of identification was substantially raised.

However, it is submitted that the previous arguments relative to the re-litigation of the pre-trial identification process and its effect on the in-court identifications were predicated upon an inadequate record which lacked a detailed version into the fundamental elements of a constitutional impropriety. It is the *Stovall* doctrine that prompted petitioner to engage the services of an investigator to interview the witnesses who had testified to the pre-trial identification, to ascertain precisely what had taken place in the area, and as to whether they had been influenced in making the identification. It is apparent that there was a direct confrontation, although surreptitious, between petitioner and witness.

> "The practice of showing suspects singly to persons for the purpose of identification and not as a line-up, has been widely condemned." *See*: *Wall*, Witness Identification in Criminal Cases, 26-40; *Stovall* v. *Denno*, *supra*.

The prohibitive retroactive applicability of the *United States* v. *Wade*, 388 U.S. 218 and *Gilbert* v. *California*, 388 U.S. 263, is the right of counsel at a pre-trial identifica-

tion procedure. It is only in that area that petitioner cannot invoke the doctrines enunciated therein. However, with this exception, petitioner does invoke the principles and standards of identification procedures set forth therein.

On the original appeal petitioner was bound by the trial record. He urged the impropriety of the surreptitious confrontation of the pre-trial identifications which were introduced by the Government at the trial. He argued that such confrontation, without according petitioner a fair line-up, constituted a constitutional infringement and that in its nature the inference of unnecessary suggestiveness emanated therefrom.

In the opinion below the court adopted the following criteria for litigation under Section 2255.

1) Where a federal trial or appellate court said nothing because the issue was not raised.

2) Where it was unclear whether the 'say' was on the merits.

3) Where new law had been made or facts uncovered relating to the constitutional claim since the trial and appeal.

4) Where the trial or appellate court based its rulings on findings of fact made after a hearing that was not full and fair.

Petitioner's case comes squarely within the concept of the above criteria. Under the totality of the circumstances in the instant case a fair line-up would have been accorded to petitioner after the new law pronounced in the *Wade-Gilbert-Stovall* trilogy. Petitioner was not accorded an evidentiary hearing in order to establish his constitutional claim.

Mullett was a witness for the Government. His affidavit cannot be discounted. Although he did not identify petitioner his statement reflects strong indications of suggestibility that may, at a evidentiary hearing, disclose an egregious, constitutional violation in the pre-trial identification process invalidating the legality of the in-court identification thereby preventing a grave miscarriage of justice. If Kreisman, Figueroa, White and Moots did testify, at a hearing, confirming Mullett's account as to the suggestiveness of the technique employed by the federal agents, it would become a matter of law and ruled impermissible as evidence and the trial court would have to ascertain whether it contaminated the in-court identification. In the opinion in the court below this issue was watered down and considered innocuous.

Figueroa testified that he identified petitioner at the site of his employment. There was no equivocation. However, Zimmerman, the investigator, avers that Figueroa and Moots both blurted out to him, "I did not identify the defendant at Delancey Street". Figueroa and Moots both declined to make a statement to Mr. Zimmerman. They refused to elaborate on their comment.

In the opposing papers in the District Court the Government could have readily obtained an affidavit from Kreisman, Figueroa, Moots and White and the matter could have been lucidly demonstrated whether an evidentiary hearing should have been accorded to petitioner.

The conviction in this case rests solely upon identification. It was said in the opinion in the court below, "A conviction resting solely on identification alleged to have been impermissibly suggestive ranks high on the list where re-examination on collateral attack is warranted if a sufficient basis is shown".

The totality of the circumstances in this case demonstrates the requirement of re-examination on collateral attack. It is amply buttressed by Mullett's, Zimmerman's and Theodore Rosenberg's affidavits. There is no documentary evidence presented to sufficiently refute the allegations made by petitioner.

POINT II

Upon the premises advanced in the application pursuant to Title 28, United States Code § 2255, an evidentiary hearing should have been had in the Court below.

The issue in the instant case is solely within the realm of identification. It is elementary trial procedure that an issue of identification, if not improbable or patently incredible, should rest exclusively within the province of the jury, either to accept or reject its validity for factual determination. Upon such premise, properly arrived at, a verdict must stand. However, if the predicated pre-trial identification is deemed constitutionally unfair, as a matter of law, and its taint irretrievably contaminates the in-court identification, the conviction cannot stand. *United States* v. *Wade*, 388 U.S. 218; *Stovall* v. *Denno*, 388 U.S. 293; *Palmer* v. *Peyton*, 354 F.2d 199 (4th Cir.), *en banc*; *Wright* v. *United States*, (D.C. Cir. Jan. 31, 1968), 404 F.2d 1256; *Foster* v. *California*, 89 S. Ct. 1127 (1969).

We do not urge the principles of the *Wade* and *Gilbert* cases' retroactive applicability, as *Stovall* v. *Denno*, *supra*, clearly defines the preclusion of retroactive applicability to or in respect to counsel requirements at a pre-trial identification procedure. However, it is strenuously urged that the circumstances of the pre-trial show-up procedure in the instant case, together with other circumstances, induced an identification which was not the product of the witnesses' objective judgment and that the Government's

capitalization upon it resulted in a deprivation of "due process of law." *Mallory* v. *United States*, 354 U.S. 449 (1957); *Payne* v. *United States*, 294 F.2d 727.

The foregoing recited decisions promulgated against infringement of due process where the manner and/or conduct of pre-trial identification procedure is unnecessarily suggestive and conducive to mistaken identification. These foregoing decisions also hold that the Government must establish by clear and convincing evidence that an in-court identification must be based upon observation of the suspect at the time of the crime, and not upon any pre-trial suggestion. Delayed presentation in order to hold a line-up is not condoned. Gatlin v. *United States*, 376 F.2d 668.

The violation of due process in the conduct of pre-trial confrontation for identification purposes must depend upon "the totality of the circumstances surrounding it." *Stovall* v. *Denno*, *supra*. There are certain situations where denial of a line-up does not come within the dimension of constitutional infringement; where it is imperative to dispense with a line-up, i.e., hospital confrontation, *Stovall* case, *supra*; where a suspect apprehended in hot pursuit is immediately brought before the victim; a victim of a crime can fortuitously encounter a suspect, knowing the perpetrator, or in crimes where the suspect is apprehended within the presence of the victim.

The crime incident in the instant case occurred on November 8, 1963. Descriptions by the victims given to the police in that period illustrated that the perpetrator, dressed as a policeman, who approached the station wagon and produced a gun, was white, 38 to 40 years of age, approximately 5 ft. 11 in., in height, over 200 pounds in weight, and possessed a fair complexion, and that he was dressed in a policeman's uniform consisting of a winter blouse with the initials "S.P." on its lapels; he had a white

metal shield and carried a black pistol. Petitioner does not fit this description, as petitioner is of Greek extraction, with an olive complexion and dark hair, and is shorter, and weighs less.

Within a relatively short time thereafter, a photograph of the petitioner was made available to the victims of the crime, and there was no identification. Approximately two years later Kreisman, Figueroa and White were brought down to the site of petitioner's employment and allegedly identified him, White identifying him in front of the Homestead Restaurant in New York City. At the trial Kreisman maintained his position that petitioner was the perpetrator of the crime, but Moots and Figueroa were not absolutely sure. In fact, the Government urged, on summation that "If you don't believe Kreisman, then I don't think you should convict" (Tr. 427). (*See*: *Appendix*, p. 14a).

There is a strong implication by virtue of Kreisman's testimony adduced at the trial, that before being brought to the site of petitioner's employment he had identified petitioner's photograph. The circumstances surrounding this identification are of paramount significance, and are vital for appropriate exploration as to the manner in which such identification was made. *Simmons* v. *United States*, 390 U.S. 377, 88 S. Ct. 967.

The investigator, Isadore Zimmerman, visited most of the witnesses who were involved in the crime incident. Figueroa testified at the trial that he identified Kapatos on Delancey Street. (*To the investigator, Mr. Zimmerman, Figueroa blurted out that he did not identify Kapatos on Delancey Street.*) This extraordinary circumstance must be considered as a vital link in the chain of circumstances. A factor that must also be considered is that Louis Moots,

Victor Figueroa, and John White, and Max Kreisman all refused to give Mr. Zimmerman, the investigator, a statement.

The affidavit presented by James Raymond Mullett, the witness for the People, states, in substance, that he was informed by the agents that they wanted him to look at a suspect as he arrived at work at a construction site under the Williamsburgh Bridge, on Delancey Street, in New York City. He was informed that the suspect was driving from New Jersey, and that "We have a very good suspect" (as told to him by one of the agents); and that when he was in the car with the agents, word came over the radio that the suspect had come through the Lincoln Tunnel and was driving to his job. The agents explained to Mullett that the suspect would be pulling up in a light green Pontiac. They further told him where the suspect would park his car and the entrance he would use to get to the job site. It was in this posture that Mullett observed the petitioner. Mullett's affidavit is pertinent, and of enormous probative value. He spells out the unnecessarily suggestive manner utilized in the pre-trial identification procedure.

Of monumental significance is the fact that White and Figueroa positively identified Kaputos at the site of his employment and in front of the Homestead Restaurant, yet at the trial could not positively identify Kaputos in court. There must be some feasible explanation for this unique discrepancy. A hearing is relevant to ascertain what exactly transpired at the extra-judicial identification which caused a positive identification two years after the crime incident, and several weeks later in court—there is doubt.

It was urged in the court below in this proceeding that trial counsel, Frank A. Lopez, Esq., will attest at a hearing that prior to the trial he was standing and conversing with petitioner alone in front of Judge Cannella's courtroom

in the Federal Court House, when the courtroom door suddenly opened, and a Federal agent peered out observing counsel and petitioner, and then led the Government witnesses out of the courtroom into the corridor and past the petitioner and counsel. The witnesses could have readily gone into the witness room without the need to exit from the front door of the courtroom. This episode was extremely prejudicial to petitioner's basic right to a fair and impartial trial.

Kreisman in his testimony, substantiates that he observed the petitioner in the court hallway before trial (Tr. 65). *See*: *Appendix*, p. 13a.

By post-conviction remedy under Title 28 United States Code § 2255, petitioner instituted a proceeding supported by an affidavit from a witness, *Joyce*, who did not testify at the trial, Joyce, in his affidavit, attests that he was in a building two stories up and observed the entire crime incident. It was his observation that the man dressed as a policeman who emerged from the passenger seat of the black sedan, approached the station wagon and when everyone else departed it was this same man who was left alone and who endeavored to drive the AAA station wagon away from the scene. Joyce further stated in his affidavit that to his observation the policeman did not succeed in driving away but emerged from the station wagon and proceeded west and encountered Mullett and Carey, and that he, Joyce, cried out to Mullett not to assist the policeman in any way. This issue can also be considered as a very strong link in the identification process chain, as Mullett, Carey, and the witness, Manousis (the frankfurter vendor) testified positively *that petitioner was not the man whom they encountered.*

The Government took the position that the man who tried to drive the AAA station wagon and who abandoned

it and confronted Mullett and Carey, was apparently the driver of the black sedan and not petitioner, and therefore accounted for the reason why the witnesses denied that petitioner was the policeman they saw.

In the totality of the circumstances, upon an evidentiary hearing, if it is established that the pre-trial identification procedure was unnecessarily suggestive it would make the in-court identification totally defective. Fundamental justice should allow petitioner the opportunity to establish that his conviction was predicated upon a flagrant constitutional infringement.

In the instant case, the pre-trial identification procedure was had before the petitioner was arrested. Petitioner had been a suspect for almost two years prior to his arrest. Kreisman allegedly identified petitioner's photograph from those shown him prior to the identification episode. At this juncture, after the so-called 'photo identification' it would be consonant with fair and competent police administration to have accorded petitioner a fair and impartial line-up. Can the Federal agents circumvent this salutary procedure by subjecting petitioner to a surreptitious confrontation? Can it be said that in the realm of a pre-trial, pre-arrest identification process that petitioner could be divested of his basic right to a fair process of police apprehension? It has been said that petitioner has no grievance solely because he was then in the investigatory stage, and therefore the surreptitious confrontation cannot be assailed. *If petitioner's position must fall because he was in the investigatory stage, then it would follow that police authority could readily, with impunity, circumvent the established safeguards of a line-up procedure by having witnesses view a subject in the investigatory stage, in derogation of his rights.*

In the circumstances of the instant case we also find a combination of investigatory and accusatory elements. It is true that there is no constitutional right to be arrested. *Hoffa* v. *United States*, 385 U.S. 293, 310. However, the fact that petitioner was not initially arrested cannot condone the impropriety of a confrontation-identification. It is to be noted that petitioner presumably had been identified by a photograph by Kreisman preceding the surreptitious identification on Delancey Street. The so-called "photo identification" has universally manifested probable cause for arrest and ultimate line-up process. This has been subverted in the instant case.

Since the issue here is solely one of identification, and no other evidence tending to connect petitioner with the crime, it is worthy of consideration together with the arguments presented in the appeal process concerning the many discrepancies in the witnesses' testimony.

To avoid a grave miscarriage of justice, the petitioner should be accorded the opportunity to establish that he had been a victim of a pre-trial identification process "so unnecessarily suggestive and conducive to an irreparable mistaken identification." It is contended that the suggestive elements in the instance identification procedure made it all but inevitable that petitioner would be identified whether or not he was, in fact, the "policeman".

In *Wright* v. *United States*, 404 F.2d 1256, 1261, the Court said:

> "Since the inadequacy of the record precludes our decision of the issue, we remand the case to the district court for an evaluation of Appellant's claim."

In *Gross* v. *United States*, 408 F.2d 1297, in a person-to-person confrontation the court held:

> "What emerges from this testimony is an apparent instance of what the Supreme Court referred to in

> *Stovall* as 'the practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up,' and which, the court added 'has been widely condemned.' Whether a due process violation in fact occurred her should, we think, be the subject of a specific inquiry by the district court on remand, culminating in findings of fact and conclusions of law."

In the dissenting opinion of Mr. Justice White in *United States* v. *Wade*, 388 U.S. 218, it was stated:

> "The rule applies to any lineup, to any other techniques employed to produce an identification and a fortiori to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information."

The denial of a hearing in this case, in effect, is a denial ". . . to have compulsory process for obtaining witnesses in his favor", Sixth Amendment. The totality of the circumstances, Mullett's affidavit, Zimmerman's affidavit and Rosenberg's affidavit all establish sufficient probable cause that inquiry is required to examine the witnesses who testified at the trial concerning the pre-trial identification. It is apparent that without judicial authority petitioner is precluded from interrogating reluctant witnesses that may be in his favor. Their refusal to talk with the investigator should not forever foreclose petitioner's endeavor to elicit the truth that may disclose a serious constitutional impropriety. Certainly the Sixth Amendment is not only confined to a courtroom. It must reach out to a witness wherever he may be. If probable cause exists that a potential witness may have information material to the defense the right of inquiry is indispensable to due process of law. Where a hearing is denied to petitioner, what recourse does he have

if a prospective witness refuses to make a statement on a vital issue? The right to question a prospective witness is of a constitutional dimension. On the stand, in a court-room, the witness would be compelled to answer relevant interrogatories except questions that may tend to incriminate him.

Fundamental justice requires that petitioner should be accorded a hearing to enable him to effectively demonstrate that his conviction was predicated upon impermissibly suggestive techniques employed to elicit an identification.

CONCLUSION

Upon the foregoing the writ of certiorari should issue in the interest of basic justice.

Respectfully submitted,

Thurgood Marshall,
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Brooklyn, New York 11201

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 916

THOMAS KAPATOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Southern District of New York of theft of jewelry from an interstate shipment in violation of 18 U.S.C. 659. On October 28, 1966, he was sentenced to imprisonment for seven years. The court of appeals affirmed the conviction without opinion on March 15, 1967 and a petition for a writ of certiorari was denied by this Court, 389 U.S. 836. As appears from the government's earlier brief in opposition (No. 166, O.T. 1967) a major issue raised

on direct appeal and in this Court was the fairness of the procedures by which petitioner was identified.

In his present motion to vacate sentence petitioner again attacked the fairness of the identification. The district court denied the motion without a hearing (Pet. App. 1a). The court of appeals affirmed with an opinion which sets forth in detail the evidence at the trial (Pet. App. 3a-7a) and the nature of the new evidence alleged (Pet. App. 7a-8a). The court stated that if "the petition had alleged any new evidence that would have significantly buttressed the claim of impermissibly suggestive identification and if this was not discoverable before the trial in the exercise of reasonable diligence, we would indeed direct a hearing." (Pet. App. 10a-11a). It deemed "a conviction resting solely on identifications alleged to have been impermissibly suggestive" to rank "high on the list where re-examination on collateral attack is warranted if a sufficient basis is shown." (Pet. App. 11a). Upon a thorough examination, however, it found that the application here "did not measure up to that standard" (Pet. App. 11a). This factual conclusion resting upon the due process standards reaffirmed in *Stovall* v. *Denno*, 388 U.S. 293, does not merit plenary review by this Court.[1]

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[1] Petitioner recognizes (Pet. 20) that the principles of *United States* v. *Wade*, 388 U.S. 218, do not apply since the identifications occurred prior to the decision in *Wade*. See *Stovall* v. *Denno*, 388 U.S. 293, 296.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1970.

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